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**NAVAL WAR COLLEGE
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Humane Treatment of Insurgents: Is the U.S. Making a Mistake?

(A View From Outside the Legal Community)

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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16 May 2006

Abstract

Humane Treatment of Insurgents: Is the U.S. Making a Mistake? (A View From Outside the Legal Community)

In the past 200 years, a concerted movement to make war more humane has successfully created legal boundaries surrounding the conduct of war. These efforts increased significantly following the World War II attacks on civilian populations, with the result that in today's warfare there is a legal requirement to focus military efforts against the military forces of the enemy. One of the prime tenets of this legal distinction is the protections contained in the Geneva Conventions surrounding uniformed combatants. In the Afghanistan and Iraq conflicts, the United States has in effect chosen to extend these rights to combatants who choose not to wear uniforms. The ramification of this decision is that there are no longer any incentives for enemies of the United States to wear uniforms but instead they are free to use the anonymity of street clothes to blend into the civilian population, without fear of consequences. While warfare is constantly changing, the United States, through its own actions, is in the process of fundamentally making warfare more difficult. The United States needs to revisit this decision, or its implementation, to prevent enemy forces in all future conflicts from shedding uniforms to limit the effectiveness of U.S. military power.

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INTRODUCTION

“If we are to survive, a new balance must be found. In normal times, evil would be fought by good. But in times like these, well, it should be fought by another kind of evil.”ⁱ

While efforts to impose limits on the conduct of war have occurred throughout human history, the advent of weapons capable of magnifying war’s death toll to astronomical heights provided incentive such that over the past 500 years a concerted movement to make war more humane has successfully created international legal boundaries surrounding the conduct of war.ⁱⁱ These efforts increased significantly following the World War II attacks on civilian populations, with the result that in today’s warfare there is a legal requirement to focus military efforts against the military forces of the enemy.ⁱⁱⁱ One of the prime tenets of these legal boundaries is the protections surrounding uniformed combatants. In essence, if combatants wear uniforms and are captured they are afforded the protections associated with classification as a Prisoner of War (POW). If they do not wear uniforms they risk being classified as an unlawful combatant or perhaps even worse, as a spy, both of which could be charged, tried and punished for their actions.

Unfortunately, in the Afghanistan and Iraq conflicts, the United States, while perhaps not intentionally, has in effect extended POW rights to humane treatment to combatants who choose not to wear uniforms. The ramification of this decision is that there are no incentives (or disincentives) for enemies of the United States to wear uniforms but

instead they are free to use the anonymity of street clothes to blend into the civilian population, without fear of consequences. Accordingly, while warfare is constantly changing, the United States is in the process of fundamentally making warfare more difficult through its treatment of unlawful combatants and the associated perception of those actions by future enemies. The United States needs to revisit decisions regarding unlawful combatants, or their implementation, to prevent enemy forces in future conflicts from shedding uniforms to limit the effectiveness of U.S. military power. These policies directly affect ongoing operations and as such, changes will necessitate different actions by U.S. forces, as well as political and perhaps legal efforts to support the changes. With that said, failing to adjust these policies in light of ramifications for the future will all but guarantee that the United States has fought its last conventional battle.

BACKGROUND

While certainly not intended to be a history lesson or legal treatise, a short (and much simplified) overview of the history and issues behind current laws of armed conflict (LOAC) will help frame the problem. While many view the current laws regulating warfare as reactions to the excesses encountered in either World Wars I or II, efforts culminating in the current body of law regulating war actually started with the recognition during the Industrial Revolution that technology was soon to increase man's destructive ability perhaps past his ability to control it.^{iv} Accordingly, concerned people created agencies, such as the International Committee of the Red Cross founded in 1864, to try to reign in warfare's effects.^v The efforts of this "Peace Movement" led to a series

of international treaties centered on restricting the conduct of warfare, including the Hague Conventions signed in 1907.^{vi}

While the mass-produced rifle might have been the first symptom that the concerns regarding the impact of the Industrial Age on war were perhaps true, the invention of the machine gun certainly drove it home.^{vii} The destructiveness of World War I proved both the validity of the fears regarding man's newfound killing abilities as well as the need to place internationally accepted bounds on how those abilities were applied. Accordingly, there were various treaties signed in the interwar period, with several addressing the recently encountered effects of chemical and aerial warfare.^{viii} The excesses encountered in World War II only added impetus to the effort, resulting in the creation of the Geneva Conventions of 1949.^{ix}

When combined with the previously signed Hague Conventions, the 1949 Geneva Conventions helped strengthen the stigma attached to the intentional attack of civilians...and the associated requirement for some form of distinction between civilians and military personnel. The 1907 Hague Conventions originally captured this distinction when it specified that belligerents were identified by the fact that they 1) were commanded by a person responsible for his subordinates; 2) wore a fixed distinctive emblem recognizable at a distance; 3) carried arms openly; 4) conducted their operations in accordance with the laws and customs of war.^x These same four criteria were again listed in the 1949 Geneva conventions as criteria for eligibility for status as a Prisoner of War.^{xi}

This distinction is important not only to protect civilians from the ravages of war by separating them from personnel who are legitimate targets, but also to assist in determining the treatment status for captured personnel. This status directly equates to the treatment the prisoner is entitled to under the LOAC. For instance, Prisoners of War can be questioned (but not tortured), but they are not required to provide information beyond the proverbial name, rank, and service number. Additionally, and more importantly, as long as their combat actions fall in line with the LOAC, they cannot be prosecuted for their actions in combat.^{xii} In essence, adherence to the elements of LOAC provides the individual soldier a “license to kill” (or combatant immunity) regardless of whether the conflict itself is legal, effectively protecting him from persecution for acts that would be illegal during peacetime.^{xiii}

These LOAC protections do not extend to those found to be unlawful combatants. Individuals who fail to adhere to the LOAC, and are subsequently declared as unlawful combatants, can be prosecuted for their actions. It does not take a stretch to see where these prosecutions could extend to situations where those actions might otherwise be considered legal within the LOAC. For instance, an unlawful combatant who attacked a purely military target risks prosecution for that action, since through his unlawful combatant status he has separated himself as an individual from the collective security afforded to members of the armed forces.^{xiv} Put differently, if he fires on military personnel his status as an unlawful combatant makes him a private citizen who has just attempted murder. Notice that this is linked solely to his illegal combatant status, and is

independent of the vehemence of his beliefs, or how they coincide with those who have been found to be lawful combatants.

While the issue of distinction, and its value, is certainly understandable intellectually, political interests have only made it much less clear. For instance, in reaction to the anti-colonialism efforts of the 1960's, world leaders created Protocol I Additional to the Geneva Conventions of 1949, which tried to extend legitimacy to the various anti-colonial insurgent efforts that were occurring at the time.^{xv} In particular, Article 44 makes openly carrying a weapon the sole condition of distinguishing oneself as a combatant. It also mandates that even if an individual fails to do so, he will be given the protection due a lawful combatant.^{xvi} Perhaps not surprisingly, this language is the principal reason the United States has not ratified Protocol I to this day, even though 146 other nations have ratified it, (albeit with some nations putting forth reservations regarding Article 44).^{xvii}

This situation is made even cloudier by United States doctrine. For instance, while the United States did not sign Protocol I, the Commander's Handbook On The Law of Naval Operations clearly states, "If determined by a competent tribunal of the captor nation to be illegal combatants, such persons may be denied prisoner-of-war status and be tried and punished. It is the policy of the United States, however, to accord illegal combatants prisoner-of-war protection if they were carrying arms openly at the time of capture."^{xviii}

The 2002 Operations Law Handbook states,

"Captors must respect (not attack) and protect (care for) those who surrender – no reprisals. GP I art. 44 expands the definition of prisoners of war to

include any combatant “who falls into the power of an adverse Party” Combatants include those who do not distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement, e.g., national liberation movements. (GP I, art. 44) U.S. asserts this definition does not reflect customary international law. Captured civilians accompanying the force also receive PW status (GPW, art. 4(a)(4)).^{”xix}

In a subsequent version, the 2006 Operations Law Handbook, we find:

“Thus, with regard to detainee issues, it is essential to emphasize the basic mandate to treat all detainees humanely; to treat captured personnel consistently with the Geneva Conventions until a more precise determination is made regarding status; and to raise specific issues on a case-by-case basis when resorting to the policy mandate is insufficient to provide effective guidance to the operational decision makers.”^{”xx}

These policies are perhaps expected since the U.S. generally strives to be viewed as the “good guys” and the primary intent behind creation of the various LOAC was to ensure some element of humane treatment was maintained as the potential levels of wartime death increased. It is also not surprising since the U.S. has generally focused on large conventional wars where they expected to face enemy forces who conformed to a shared vision of the nature of warfare.

ANALYSIS

With that said, the ongoing GWOT has introduced a different model of warfare, one where, at least in the case of Al Qaeda and its affiliates, enemy forces do not have an accountable parent state but instead are independent agents on the battlefield. Shortly after the invasion, and in reaction to this situation, on 13 November 2001 President Bush issued a military order entitled “Detention, Treatment, and Trial of Certain Non-Citizens

in the War Against Terrorism.”^{xxi} In essence, this order modified the policy discussed above to ensure that Al Qaeda combatants were tried for their unlawful actions. Specifically, it’s intent was “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order...to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”^{xxii}

This order almost immediately came under attack, fueled further by the fact that the Secretary of Defense chose to hold prisoners at a facility in Guantanamo Bay, Cuba. Although controversial, the Guantanamo decision was fully in keeping with the order, since it laid out specifically the treatment of the prisoners:

- “Sec 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be –
- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
 - (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
 - (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
 - (d) allowed the free exercise of religion consistent with the requirements of such detention; and
 - (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.”^{xxiii}

Since international treaties allow for trial of unlawful combatants, and since it is clear that this order simply provides implementation guidance for the GWOT, much of the controversy resulted because the United States applied this unilaterally against a body of individuals, without first using a tribunal system to decide their status.^{xxiv} In essence, the opinion is that a declaration by the President is not equal to the deliberations that would

occur in the presence of a tribunal. The reasoning behind this concern is important since historically there is great potential for abuse. For instance, before the 1949 Geneva Conventions, "...summary decisions were often made by soldiers of relatively low rank on the battlefield, leading to instances where a captive could be presumed unlawful and executed on the spot, with any investigation to follow."^{xxv}

While certainly not absolute, it is also likely that the controversy largely erupted because of the worldwide growth in humanitarian causes over the last fifty years, which in turn appears to have led to a mistaken public view that trial for unlawful combatants is somehow illegal or inhumane. The International Committee of the Red Cross (ICRC) led much of this growth; even going so far as to consider the various LOAC treaties as part of an overarching construct they call International Humanitarian Law (IHL).^{xxvi} While this cause might be admirable and perhaps worthwhile, in practice it has only served to further muddy the waters since not only did it introduce a new term with "IHL" to a field already rife with unique legalese, but it also helped create an expectation for war almost without civilian casualties.

These two effects, confusion in terminology and increased expectations, lead directly back to the current friction over treatment of unlawful combatants. For instance, increasing the number of terms used in LOAC does not assist in growing worldwide understanding of LOAC itself. Since few nations have programs to educate their citizens on LOAC, changing terminology does not lend itself to the "education by osmosis" that occurs worldwide as civilians collect LOAC information from media sources.

As for the world's increased expectation for bloodless war, while largely extending from the growth in awareness of humanitarian causes, it has increased also through the highly visible continuation of the technological progress that began in the Industrial Age.

Images of selective targeting of military targets in and among civilian urban areas have captured the imagination, such that today's precision weapons provide a mechanism by which the world's civilian population (and advocates of humanitarianism) can envision a reduction and possible end to collateral damage to non-combatants.

Sadly, there is a result that logically flows from the combination of this vision and the increased capabilities that accompany precision weapons. Simply put, dedicated enemy forces will try to play one effect against the other such that neither humanitarians nor military forces will achieve their goals. In turn, what we see happening in Iraq is what we can expect in the future, where enemy combatants do not fight as discrete units solely against military forces but instead flow among the civilian population, in civilian clothes, and target civilians and military alike.

Although Frank Hoffman misses the larger potential by focusing on Small Wars, he reinforced this vision of the future when in 2005 he wrote: "Whether they have been dissuaded by the overwhelming might of the US military, or merely seek to operate within their own strategic culture and available means, tomorrow's enemies will not fight with traditional means."^{xxvii} Colonel Thomas X. Hammes, USMC (Ret) further discusses this exact view of the future in chapter 25 of *Rethinking the Principles of War*, where he illustrates the perspective of the enemy by quoting Al Qaeda member Ubeid Al-Qurashi,

“In Afghanistan, the Mujahideen triumphed over the world’s second most qualitative power at that time....Similarly, a single Somali tribe humiliated America and compelled it to remove its forces from Somalia. A short time later, the Chechen Mujahideen humiliated and defeated the Russian bear. After that, the Lebanese resistance [Hezbollah] expelled the Zionists army from southern Lebanon...

Technology did not help these great armies, even though [this technology] is sufficient to destroy the planet hundreds of times over using the arsenal of nuclear, chemical, and biological weapons. The Mujahideen proved their superiority in fourth-generation warfare using only light weaponry. They are a part of the people and hide among the multitudes....”^{xxviii}

Some might argue that these comprise a reactionary view of warfare’s future resulting from the ongoing GWOT but others predicted this years before. In 1994, Ralph Peters even touched on the heart of this paper, when he wrote, “Unfortunately, the enemies we are likely to face through the rest of this decade and beyond will not be “soldiers,” with the disciplined modernity that term conveys in Euro-America, but “warriors”—erratic primitives of shifting allegiance, habituated to violence, with no stake in civil order. Unlike soldiers, warriors do not play by our rules, do not respect treaties, and do not obey orders they do not like.”^{xxix}

Today, we are seeing this failure to abide by internationally accepted rules, but have continued to react as though nothing is different. For instance, in a 2004 editorial Under-Secretary of Defense Douglas Feith, while acknowledging the change, perpetuated the humanitarian vision, even as he tried to support ongoing military detainee operations. Specifically, he stated support for the Geneva Conventions as “an incentive system for good behavior” and that “the U.S. can apply the convention to the Taliban and Al Qaeda as a matter of policy without having to give them POW status because none of the

detainees remaining in U.S. hands played by the rules.” He also pointed out that the U.S. would stress humane treatment of all detainees.^{xxx}

Inherent within Under Secretary Feith’s editorial, and the current strategy to handle this new warfare model, is the view that the various LOAC Conventions comprise an incentive system that uses reward and punishment as a mechanism to entice compliance. Beyond the previously mentioned worldwide lack of LOAC education and nature of the enemy, this falls apart rather rapidly since those very conventions promise humanitarian treatment, regardless of whether the behavior of the combatant in question falls to the level of subhuman. This is captured in the Part I, Article 3 of Geneva Convention IV when it states:

“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”^{xxxii}

This is not to say LOAC has no teeth, since its incentive (or disincentive) system specifies the possibility of punishment of unlawful combatants. Many examples of using tribunals exist too, with perhaps the Nuremburg trials following World War II being the most well known. More recently, and subsequent to the 1949 Geneva Conventions, the UN Security Council has appointed tribunals for war criminals with minimal controversy, with the tribunals for the former Yugoslavia being a case in point.^{xxxii}

In the case of wearing uniforms though, enough confusion exists that trial by tribunal for this LOAC breach is doubtful, particularly in light of the worldwide support of insurgent activities that resulted in Protocol I to the Geneva Conventions.^{xxxiii} This is exacerbated by the Convention's punishment focus on what are termed grave breaches, most of which are aimed at major violations of the ethos of humanitarianism. Articles 129 and 130 of Geneva Convention III, quoted below, drive this home,

“Art. 129. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

Art. 130. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful [Sic] killing, torture or inhuman treatment, including biological experiments, wilfully [Sic] causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully [Sic] depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

While the grave breaches outlined above may be egregious, it is important to note the wording used for other breaches, “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions...” “Suppressing” breaches certainly does not convey the same weight as the language concerning grave breaches, providing an automatic lessening in the emphasis, strength and zeal by which other breaches are viewed or treated.

This emphasis might be appropriate to regular armies possessing discipline, training and an overarching government who can be held accountable for their actions. Yet, in today’s new military paradigm, this may not be enough, since today’s weapon’s effectiveness and the nature of the enemy create a situation where waiting until an individual “wilfully kills” civilians under the guise of civilian clothing not only promises significant casualties, but almost guarantees that there is no government standing by to accept responsibility for their actions.

If we accept this lack of a parent government and look at just punishing individuals for their actions on a case-by-case basis, LOAC does include provisions for punishing what is termed perfidy, which is essentially a breaking of trust.^{xxxiv} Even the controversial Protocol I includes provisions regarding perfidy,

“Art. 37. Prohibition of Perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: (a) the feigning of an intent to negotiate under a flag of truce or of a surrender; (b) the feigning of an incapacitation by wounds or sickness;

- (c) the feigning of civilian, non-combatant status; and (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.”^{xxxv}

Yet, perfidy, which potentially strikes directly at the heart of the intent behind LOAC, is not listed as a grave breach, putting it in the category of “suppression of acts.” Not exactly a firm commitment from the international community, but the potential exists for a more unilateral approach.

CONCLUSIONS

With all of the above, the question then becomes “If LOAC accounts for all of this, then what is wrong?” Simply put, we are facing an enemy who does not respect rules, and when faced with “rule breakers” we appear stymied, grasping at the hopes of increased weapons effectiveness or wishful humanitarian thinking and its attendant social programs. Unfortunately, these are unlikely to be enough to combat this dangerous enemy and his new warfare model. Even in the instance where we have tried to use LOAC to hold individuals accountable we have seen the entire process over the prisoners held at Guantanamo become mired in legal challenges and good intentioned moral angst.

Realistically, these challenges to using LOAC are self-inflicted by what can be viewed as a Post-Enlightenment focus on the value of every human, no matter how worthless he really is to society. Even the Geneva Convention's instructions regarding punishment for detainees who do not conform to the rules of detainment reflect this concern,

“Art. 89. The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days. (2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention. (3) Fatigue duties not exceeding two hours daily. (4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.”^{xxxvi}

The basic punishments listed above are so vacuous as to be worthless. For instance, if the POW is already confined, what care will he have if he is confined some more? While the conventions do include the possibility of a death penalty, they also stipulate mandatory time delays and notifications before execution such that regardless of the gravity of the offense, it is clear that choosing to pursue the death penalty will involve much consternation.^{xxxvii}

Obviously, to this point the U.S. has chosen to ratify and abide by the LOAC because it has provided some worthwhile benefits in the past. These include minimizing world condemnation during conflicts, a “feel good” domestic attitude about our position in the world, plausible deniability of wrongdoing because “we abide by LOAC,” and generally good effects on governments and armies with which we have fought.

Unfortunately, those days have been left behind, particularly since continuing in this vein promises to de-legitimize conventional forces and operations such that in the future LOAC will not protect civilians but through our LOAC adherence will guarantee increased civilian casualties. Much of this comes from LOAC's failure to stigmatize fully those fighting out of uniform, and the resulting encouragement this provides to non-state actors who are resource constrained.

The growth in non-state actors is particularly troubling to the future of LOAC since one of the founding assumptions behind its creation was that extending humanitarian protection to combatants was possible since they could be held accountable for their actions through their governments. Without that government backing and accountability, non-state combatants are essentially unleashed on the world to claim protections that they are unwilling to recognize or afford to others.

RECOMMENDATIONS

What is needed is recognition that Ralph Peters was correct when he said, "Today's warriors have a tremendous advantage ... in the struggle for survival, however: the West's pathetic, if endearing, concern for human life, even when that life belongs to a murderer of epic achievement."^{xxxviii} While the goals inherent within the LOAC are morally and intellectually gratifying, they are not meant for opponents such as those we face today and we need to accept that and move forward.

First we should set aside our “overcultivated Western consciences”^{xxxix} and accept that we should change policy towards non-uniformed combatants so that instead of treating them as POWs, there is no longer protection against inhumane treatment for those who fail to distinguish themselves from civilian populations. This treatment does not need to extend so far as to include torture, but should make it clear that treatment of POWs will be much different than for those found to be unlawful combatants. These policy and treatment changes should be publicized, with the simple message that “war is ugly, it is worse if you don’t play by the rules.” Finally, we should expedite the use of military tribunals to handle captured personnel, both for adjudicating their status and for punishing their transgressions. If LOAC is to survive at all, each of its tools must be used to their full extent, including those that might offend world sensibilities, such as the death penalty.

Of course, there are costs to this approach, such as the need to change LOAC to allow for different levels of treatment, and probable consternation on the part of liberal Western nations. Neither of these are insurmountable, just distasteful to cultured people used to indulging their humanitarian inclinations. Since the world is clearly not a nice place, perhaps we need to accept that dealing with it might take a more pragmatic approach, one that objectively accepts the truthful answer to Ralph Peters’ question, “Is all human life truly sacred, no matter what crimes the individual or his collective may commit?”^{xl}

ⁱ *The Chronicles of Riddick*, Aereon (Judy Dench), Directed by David Twohy. Written by David Twohy, Jim Wheat, and Ken Wheat. Produced by Camille Brown, Vin Diesel, and Scott Kroopf. (California, Hollywood: 2004)

ⁱⁱ John Keegan, *A History Of Warfare* (New York, NY: Vintage Books, 1994), 382-384.

ⁱⁱⁱ Micheal Reisman and Chris T. Antoniou, *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict*, (New York, NY: Vintage Books, 1994), 87-89.

^{iv} Reisman and Antoniou, xviii-xix.

^v Reisman and Antoniou, xxi.

^{vi} Reisman and Antoniou, xviii.

^{vii} John Ellis, The Social History of the Machine Gun, (Baltimore, MD: Johns Hopkins University Press, 1986, (first published in 1975 by John Ellis)), 173-174.

^{viii} Reisman and Antoniou, 57, 78, 83, 95. (This idea of adjusting LOAC to innovation in war seems to be focused on technological changes, and not to changes in tactics or behavior. The interwar period shows the recognition of submarine, aerial, chemical warfare as new battlefield dynamics, and yet today there is no international call to change LOAC to correct for worldwide LOAC abuses such as rampant targeting of civilians. Since this is clearly already illegal, the failure to adjust the LOAC disincentives to shape behavior promises that the future of LOAC is questionable.)

^{ix} Reisman and Antoniou, 84.

^x Reisman and Antoniou, (Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Article 1), 41. The full Article is quoted:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.””

^{xi} Geneva Convention III, Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (Webpage modified 12 May 06) <http://www.genevaconventions.org/> (12 May 06) Article 4 A is quoted below:

“Art. 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: [(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

^{xii} Naval Doctrine Command, The Commander’s Handbook On the Law of Naval Operations, (Norfolk, VA, 1995) 11-2 to 11-3.

^{xiii} Christopher Kutz, “The Difference Uniforms Make: Collective Violence In Criminal Law and War,” Philosophy and Public Affairs, Spring 2005, 33, 2, p160

^{xiv} Christopher Kutz, 164.

^{xv} Reisman and Antoniou, 43-44.

^{xvi} Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977 (Webpage modified 20 Feb 06) <http://www.ohchr.org/english/law/protocol1.htm> (12 May 06) The pertinent portion of Article 44 is as follows:

“3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.”

^{xvii} Christopher Kutz, 154.

^{xviii} Naval Doctrine Command, 12-2.

^{xix} Judge Advocate General's Legal Center and School, Operational Law Handbook 2002 (Charlottesville, VA, 2002), 534. (08 May 01) [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f/\\$FILE/Master%20Document.pdf](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f/$FILE/Master%20Document.pdf) (13 May 06) The coverage of detainee operations in this version of the OpLaw Handbook is essentially a breakdown of the legal issues inside a chapter on LOAC. For example, other than treatment of sick and wounded, the pertinent portions are below:

“PROTECTED PERSONS

Hors de Combat, Prohibition against attacking enemy personnel who are “out of combat.”

Prisoners of War. (GPW, art. 4, HR, art. 23c, d.)

Surrender may be made by any means that communicates the intent to give up. No clear-cut rule as to what constitutes a surrender. However, most agree surrender constitutes a cessation of resistance and placement of one’s self at the discretion of the captor. The onus is on the person or force surrendering to communicate intent to surrender. Captors must respect (not attack) and protect (care for) those who surrender—no reprisals. GP I art. 44 expands the definition of prisoners of war to include any combatant “who falls into the power of an adverse Party” Combatants include those who do not distinguish themselves from the civilian population except when carrying arms openly during an

engagement and in the deployment immediately preceding the engagement; e.g., national liberation movements. (GP I, art. 44.) U.S. asserts this definition does not reflect customary international law. Captured civilians accompanying the force also receive PW status (GPW, art. 4(a)(4)).

Identification and Status. The initial combat phase will likely result in the capture of a wide array of individuals.⁴ The U.S. applies a broad interpretation to the term “international armed conflict” set forth in common Article 2 of the Conventions. Furthermore, DoD Directive 5100.77, the DoD Law of War Program, states that U.S. Forces will comply with the LOW regardless of how the conflict is characterized. Judge advocates, therefore, should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined. In that regard, recall that “status” is a legal term, while “treatment” is descriptive. When drafting or reviewing guidance to soldiers, ensure that the guidance mandates treatment, not status. For example, a TACSOP should state that persons who have fallen into the power of U.S. Forces will be “treated as PW,” not that such persons “will have the status of PW.” When doubt exists as to whether captured enemy personnel warrant continued PW status, Art. 5 (GPW) Tribunals must be convened. It is important that judge advocates be prepared for such tribunals. During the Vietnam conflict, a Directive established procedures for the conduct of Art. 5 Tribunals; however, no comparable Directive is presently in effect.⁵

Treatment. There is a legal obligation to provide adequate food, facilities, and medical aid to all PWs. This obligation poses significant logistical problems in fast-moving tactical situations; thus, judge advocates must be aware of how to meet this obligation while placing a minimum burden on operational assets.⁶ PWs must be protected from physical and mental harm. They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, PWs must be allowed to retain possession of their personal property, protective gear, valuables, and money. These items must not be taken unless properly receipted for and recorded as required by the GPW. In no event can a PW’s rank insignia or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

Detainees. Particularly in Military Operations Other Than War, where there are no lawful enemy combatants (e.g., Somalia, Haiti, Bosnia, as discussed above), persons who commit hostile acts against U.S. forces or serious criminal acts and are captured do not meet the legal criteria of PW under the GPW. These persons may be termed “detainees” instead of PW.”

^{xx} The Judge Advocate General’s Legal Center and School, Operational Law Handbook 2006 (Charlottesville, VA, 2006), 534. (09 June 05) http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf (12 May 06) Detainee Operations are outlined in Chapter 25. It is interesting to note in comparison to the 2002 version, the coverage of detainee operations now occupies a full chapter and that the majority of this Chapter outlines the history and policies surrounding the detainees resulting from the GWOT vice presenting a generic overview of legal issues surrounding detainees.

^{xxi} President, Military Order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” (13 November 2001) <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (28 April 2006)

^{xxii} President, Section 1, (e).

^{xxiii} President, Section 3.

^{xxiv} Jennifer Elsea, “Treatment of “Battlefield Detainees” in the War on Terrorism”, (Wash, DC, Congressional Research Service, April 11 2002), CRS-1-2.

^{xxv} Elsea, CRS-28-29.

^{xxvi} ICRC. “International Humanitarian Law: Answers to Your Questions” Pamphlet. (24 Feb 2004) [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC_002_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open) (12 May 06) The ICRC website has an extensive section on International Humanitarian Law (IHL). The ICRC perspective is worthy of study by military personnel since it closely resembles that of many around the world and has far ranging issues for the future of warfare.

^{xxvii} Frank Hoffman, “Small Wars Revisited: The United States and Nontraditional Wars” Journal of Strategic Studies, Vol 28, No. 6, December 2005 pp1-28.

^{xxviii} Thomas X. Hammes, “Rethinking the Principles of War: The Future of Warfare”, Rethinking the Principles of War, edited by Anthony D. Mc Ivor (Baltimore, MD, Naval Institute Press, 2005), 270-271.

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- ^{xxix} Ralph Peters, "The New Warrior Class," *Parameters*, Summer 1994 issue, (26 Feb 1998) <http://www.carlisle.army.mil/usawc/Parameters/1994/peters.htm> (13 May06) p16. This is an excellent portrayal of not only the enemy we face today but the failure of the U.S. military to grow greater cultural awareness.
- ^{xxx} Douglas J. Feith, "Conventional Warfare" (New York, NY, Wall Street Journal (Eastern Edition), May 24, 2004) p A.14.
- ^{xxxi} Geneva Convention IV, Relative to the Treatment of Civilian Persons in Time of War, Geneva, 12 August 1949 (No date available for last webpage modification) <http://www.genevaconventions.org/> (13 May 06)
- ^{xxxii} Reisman and Antoniou, 390-404.
- ^{xxxiii} Maj William H. Ferrell, III, "No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations In International Armed Conflict," *Military Law Review*, Vol 178, Winter 2003, 94-140. Joseph P. Bialke, "Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict," *Air Force Law Review*, Vol 55, Spring, 2004, 1-85. W. Hays Parks, "Special Forces' Wear of Non-Standard Uniforms" *Chicago Journal of International Law*, Chicago: Fall 2003, Vol 4, Iss 2, 493-561. These three studies of the wearing of uniforms in the context of the ongoing GWOT provide an outstanding overview of the complexity of this issue. Each is written from a legal perspective by a lawyer, making for dry reading. This is unfortunate since it is likely to deter military personnel focused on operational issues from reading them, even though this issue is sure to remain pertinent far into the future.
- ^{xxxiv} Maj William H. Ferrell, 117-118.
- ^{xxxv} Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Protocol I), Article 37.
- ^{xxxvi} Geneva Convention III, Art 89.
- ^{xxxvii} Geneva Convention III, Art 100-101.
- ^{xxxviii} Ralph Peters, 20.
- ^{xxxix} Ralph Peters, 16.
- ^{xl} Ralph Peters, 25.

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